Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

NORTH STAR ALASKA HOUSING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, and
FAIRBANKS NORTH STAR BOROUGH,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tucker Act, 28 U.S.C. § 1346(a)(2), impliedly forbids a district court from taking jurisdiction under the Administrative Procedures Act, 5 U.S.C. § 702, and 28 U.S.C. § 1331, over a claim seeking to equitably reform a contract to lease federal property where the substance of the claim is the United States' violation of statutory and Constitutional obligations.

PARTIES TO THE PROCEEDING

Petitioner North Star Alaska Housing Corporation was the plaintiff and appellant below. The United States of America was the defendant and appellee below. The Fairbanks North Star Borough was the intervenor and appellee below.

Petitioner North Star Alaska Housing Corporation has no parent or subsidiary corporations.

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For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner North Star Alaska Housing Corporation ("North Star") petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") filed on January 18, 1994.

OPINIONS BELOW

The panel opinion of the Ninth Circuit (reprinted in Appendix "A") is reported at 14 F.3d 36. The *en banc* opinion of the Ninth Circuit (reprinted in Appendix "B")

is reported at 9 F.3d 1430. The Ninth Circuit's order setting the case for rehearing *en banc* (reprinted in Appendix "C") is reported at 1 F.3d 967. The Ninth Circuit's order assigning the case to the *en banc* court is included at Appendix "D." The Judgment of the Ninth Circuit is included at Appendix "E." An excerpt of the transcript of the proceedings of the United States District Court of the District of Alaska (the "District Court") is included at Appendix "F." The Minute Order of the District Court is included at Appendix "G."

JURISDICTION

The opinion (Appendix "A") and judgment of the Ninth Circuit (Appendix "E") were filed on January 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, section 3, clause 2 of the United States Constitution provides:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

5 U.S.C. § 702 provides, in pertinent part:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

10 U.S.C. § 2667 provided, in pertinent part:

> "(a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is –
>
> "(1) under the control of that department;
>
> "(2) not for the time needed for public use; and
>
> "(3) not excess property, as defined by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).
>
> "(b) A lease under subsection (a) –

"(1) may not be for more than five years, unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest;

. . . .

"(3) must permit the Secretary to revoke the lease at any time, unless he determines that the omission of such a provision will promote the national defense or be in the public interest . . . . "[1]

10 U.S.C. § 2828 provides, in pertinent part:

"(a)(1) Subject to paragraph (2), the Secretary of the military department concerned may lease housing facilities at or near a military installation in the United States, Puerto Rico, or Guam for assignment, without rental charge, as family housing to members of the armed forces and for assignment, with fair market rental charge, as family housing to civilian employees of the Department of Defense stationed at such installation.

"(2) A lease may only be made under paragraph (1) if the Secretary concerned finds that there is a shortage of adequate housing at or near such military installation and that –

"(A) the requirement for such housing is temporary;

"(B) leasing would be more cost effective than construction or acquisition of new housing;

---

[1] 10 U.S.C. § 2667(b)(3) has been slightly amended; the word "must" has been replaced by "shall." Public Law No. 102-190 § 2862(a)(1).

"(C) family housing is required for personnel attending service school academic courses on permanent change of station orders;

"(D) construction of family housing at such installation has been authorized by law but is not yet completed; or

"(E) a military construction authorization bill pending in Congress includes a request for authorization of construction of family housing at such installation."

28 U.S.C. § 1331 provides:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1346(a) provides, in pertinent part:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

. . . .

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject

to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 . . . . "

28 U.S.C. § 1491(a)(1) provides, in pertinent part:

"The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . "

STATEMENT OF THE CASE

1. Statement of Facts.

This case involves whether the District Court had jurisdiction to equitably reform petitioner's contract with the United States where the United States violated federal statutes and the Constitution by citing in the contract the wrong statutory enabling authority.

Petitioner alleged in its complaint:

In 1986, Petitioner and the United States executed an Outlease under which petitioner leases federal property on the Fort Wainwright Military Reservation in Alaska for the sole purpose of constructing 400 military housing units.[2] (Appendix "H," App. 21-22.) The Outlease

[2] Petitioner and the United States also entered into a separate lease under which petitioner leases back to the United States the land and the improvements petitioner constructed thereon for occupancy by the United States Army. (Appendix "H," App. 22.)

expressly provides that it is authorized pursuant to 10 U.S.C. § 2667. (Appendix "H," App. 21.)

The parties were "mutually mistaken" in citing in the Outlease 10 U.S.C. § 2667 as Congressional enabling authority. (Appendix "H," App. 23.) 10 U.S.C. § 2667 does not provide the needed authorization because: (1) the required finding that the land is "not for the time needed for public use" was never made; (2) the determination required by 10 U.S.C. § 2667(b)(1) that a lease term of more than five years will promote the national defense or be in the public interest was never made; and (3) the United States never made the determination required by 10 U.S.C. § 2667(b)(3) that the omission of a provision in the Outlease permitting the United States to revoke the Outlease at any time would promote the national defense or be in the public interest. (Appendix "H," App. 22-23.) The actual Congressional authority for the United States to enter into the Outlease for its initial twenty years is set forth in 10 U.S.C. § 2828. (Appendix "H," App. 23.)

Because of the erroneous action of the United States in stating that 10 U.S.C. § 2667, rather than 10 U.S.C. § 2828(g), constituted proper authority for the Outlease, petitioner is suffering legal wrong and is adversely affected and aggrieved in that intervenor Fairbanks North Star Borough (the "Borough") has assessed and is continuing to assess real property taxes against petitioner for its interest in the housing project, contrary to Congressional intent as embodied in 10 U.S.C. § 2828(g). (Appendix "H," App. 23.)

Article IV, section 3, clause 2 of the Constitution requires specific Congressional authority for the United

States to lease property. The statute cited in the Outlease does not provide the necessary authorization. The United States' reference to the wrong statute was contrary to the Constitution and federal statutes. Petitioner seeks to reform the Outlease to reflect the correct Congressional authorization.

2. Proceedings in the District Court.

After petitioner filed its complaint for reformation (Appendix "H," App. 21), the United States (and the Borough which had intervened) moved to dismiss the complaint for lack of jurisdiction. (ER 50, 52.)[3] They contended that petitioner's lawsuit was founded on an express contract with the United States and that the Tucker Act [28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1491] impliedly precluded the District Court from taking jurisdiction. Petitioner contended that the District Court had jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. § 702, and article IV, section 3, clause 2 of the Constitution; that the lawsuit was not founded upon a contract with the United States but rather was an action to enforce Constitutional and statutory rights and remedies; and that even if petitioner's claim was contractual, the APA waived sovereign immunity for such a claim. Since petitioner did not seek money damages, petitioner contended that the claims court (now the United States Court of Federal Claims) would not have jurisdiction over the reformation claim

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[3] "ER" refers to the Excerpts of Record that were filed in the Ninth Circuit.

and if the District Court did not exercise jurisdiction, petitioner would not have a remedy.

At the hearing that took place on April 11, 1991, the District Court ruled that petitioner's lawsuit at its essence was based on a contract with the United States, and the Tucker Act impliedly precluded the District Court from exercising its jurisdiction. (Appendix "F," App. 15-19.) The District Court dismissed the lawsuit. (*Id.*; Appendix "G," App. 20.)

3. Proceedings in the Court of Appeals.

Petitioner appealed to the Ninth Circuit under 28 U.S.C. § 1291 and contended: (a) petitioner's claim was not founded upon a contract under the Tucker Act but instead stemmed from the United States' statutory obligations under 10 U.S.C. § 2667 and the Constitution; (b) the decision upon which the District Court relied [*North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. den.* 474 U.S. 931 (1985) (*"North Side"*)] impermissibly overruled by implication a prior Ninth Circuit decision [*Lehner v. United States*, 685 F.2d 1187 (9th Cir. 1981), *cert. den.* 460 U.S. 1039 (1983) (*"Lehner"*)] and therefore needed to be reconsidered; (c) the *North Side* majority misconstrued Congress' intent when Congress amended Section 702 of the Administrative Procedures Act ("APA"); and (d) this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) mandated that the District Court take jurisdiction over petitioner's equitable and non-monetary claims.

A Ninth Circuit panel heard argument. Nearly four months later, the Ninth Circuit ordered that the case be

reheard *en banc*. (1 F.3d 967, Appendix "C," App. 12; Appendix "D," App. 13.)

The full court heard argument and issued an *en banc* decision (9 F.3d 1430, Appendix "B," App. 6) in which it resolved the intra-circuit conflict between *North Side* and *Lehner* by overruling and rejecting *Lehner* and reaffirming *North Side*. The Ninth Circuit refused to follow or apply *Bowen v. Massachusetts*. The Court remanded the matter to the panel to determine whether petitioner's claim was contractually or statutorily based. (9 F.3d at 1433, Appendix "B," App. 10-11.)

Following the remand, the Ninth Circuit issued a panel decision and concluded that petitioner's claim was contractually based because petitioner's "right to *reformation* [was] based upon the contractual agreement itself." (14 F.3d at 37, Appendix "A," App. 3-4 emphasis in original, footnote omitted.) While the panel acknowledged that *Bowen v. Massachusetts* "suggests that contract actions seeking equitable relief could be heard in district court under the APA," the Ninth Circuit refused to overrule *North Side* without "more certain direction from the Supreme Court." [14 F.3d at 38, Appendix "A," App. 5, *quoting in part, Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 613 (D.C. Cir. 1992) ("*Transohio*")].

Although the Ninth Circuit recognized that petitioner's claim arose under federal law, it concluded that the claim was barred by the doctrine of sovereign immunity. The Ninth Circuit essentially held that the waiver of sovereign immunity contained in 5 U.S.C. § 702 of the APA was not available because the Tucker Act, 28 U.S.C. § 1346, impliedly forbade relief on petitioner's claim.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling that the waiver of sovereign immunity set forth in 5 U.S.C. § 702 of the APA does not permit the District Court to consider petitioner's claim asserting statutory and Constitutional violations – simply because that claim involves a contract with the United States – should be reviewed by this Court. It conflicts with this Court's decision in *Bowen v. Massachusetts* and the decision of at least one other court of appeals. [*Katz v. Cisneros*, 16 F.3d 1204, 1994 WL 43509 (Fed. Cir. 1994).]

The Ninth Circuit's decision misapprehends the applicable law of sovereign immunity. The court, and other courts of appeals, fail to correctly interpret the extent of the waiver of sovereign immunity intended by Congress when it amended 5 U.S.C. § 702 in 1976 with the express intention of broadening the scope of judicial review of unlawful agency action, particularly where the Tucker Act might come into play. Several of those courts – including the Ninth Circuit in this case – have invited direction from this Court.

The issues presented in this case are of exceptional importance. Clarification of these issues of federal jurisdiction would result in substantial benefits through the avoidance of unnecessary future litigation and clarification of this complicated and confusing area.

1. In *Bowen*, this Court addressed the jurisdictional interrelationship of 5 U.S.C. § 702 and the Tucker Act and mandated a broad construction of the APA waiver of sovereign immunity, which the lower courts in this case refused to follow. This Court intimated that contract-

related cases invoking equitable remedies should be brought in district court. 487 U.S. at 895.

In *Bowen*, the Secretary of Health & Human Services ("HHS") indicated that he would refuse to reimburse the State of Massachusetts (the "State") for charges incurred in the State's Medicare Program. The State sued in district court seeking declaratory and injunctive relief, including an order requiring HHS to pay the monies in dispute. The United States raised a jurisdictional objection in response and contended that the APA did not waive sovereign immunity. This Court rejected HHS's "narrow construction of the 1976 amendment [to the APA] – which was unquestionably intended to broaden the coverage of § 702" and "designed to remove 'technical' obstacles to access to the federal courts." 487 U.S. at 896 (citation and footnote omitted).

Indeed, this Court specifically noted that where conflict exists between the APA and the Tucker Act, the

> "policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between the two statutes, established principals of statutory construction mandate a broad construction of the APA and a narrow interpretation of the Tucker Act."

487 U.S. at 908-909 n. 46, quoting *Delaware Div. of Health and Social Services v. Department of Health and Human Services*, 665 F. Supp. 1104, 1117 n. 15 (Del. 1987). This Court's discussion centered on a *choice* of forum analysis – should the State's claims have been brought in the claims court or the district court. But the principles expressed in *Bowen* should apply with equal or greater force where a litigant seeks equitable relief unavailable

before the court of federal claims and must litigate in district court or not at all. Justice Scalia, in dissent, echoed the majority's conclusion that district court jurisdiction picks up where claims court jurisdiction leaves off:

> "Since under the Tucker Act the *absence* of Claims Court jurisdiction generally turns upon the distinction between money damages and specific relief, it is sensible, if possible (and here it is not only possible but most natural), to interpret § 702 so that the *presence* of district court jurisdiction will turn upon the same distinction. Otherwise, there would be a gap in the scheme of relief – an utterly irrational gap . . . . "

487 U.S. at 914-15 (emphasis in original, footnote omitted).

In the lower courts in this case, the United States endeavored to distinguish *Bowen* on the ground that in *Bowen*, the State did not invoke a contract claim. The Ninth Circuit recognized that *Bowen* "suggests that contract actions seeking equitable relief could be heard in district court under the APA." (14 F.3d at 38, Appendix "A," App. 5.) Indeed, this Court in *Bowen* clearly made that intimation. 487 U.S. at 895. Similarly, the District Court aptly noted that "*Bowen versus Massachusetts* certainly gives rise to doubt" (Appendix "F," App. 18) as to the propriety of its decisions. *See also Transohio*, 967 F.2d at 611-614. But despite the expressed doubts, the lower courts refused to apply *Bowen* to this case without the direction of this Court. (14 F.3d at 38, Appendix "A," App. 5.)

The Federal Circuit in *Katz v. Cisneros*, rejected a similar contention by the United States that *Bowen* applied only in the absence of a contract. There, the plaintiff sued the Secretary of the United States Department of Housing and Urban Development ("HUD") in district court and advanced contract claims for declaratory judgment, breach of contract, breach of duty, third-party beneficiary of contract, and quantum meruit. Like here, federal statutes governed the rights and responsibilities of the parties. The district court concluded that the court of claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and transferred the lawsuit to that court. On appeal, the court of appeals reversed and remanded and rejected the United States' arguments regarding the breadth of *Bowen*. The court of appeals concluded that the existence of a contract was not determinative:

> "Merely because the challenged regulations are tracked in the language of the contract . . . does not mean that [the plaintiff] seeks a kind of relief different from that in *Bowen* – specific and prospective. 'The answer to the sovereign immunity and jurisdiction questions depends not simply on whether a case involves contract issues, but on whether, despite the presence of a contract, plaintiffs' claims are founded only on a contract, or whether they stem from a statute or the Constitution.' "

1994 WL 43509 at p. 7, quoting *Transohio*, 967 F.2d at 609. Thus, the court applied the ruling of *Bowen*, even though the plaintiff might ultimately receive money and even though the plaintiff listed "six counts, all of which

invoke[d] contractual relief" and asked "only for enforcement of the contract or damages for breach." 1994 WL 43509 at p. 10 (Rader dissenting).

The decisions of virtually all circuit courts adopting the "implied preclusion" argument are based on the assumption that the Tucker Act gives the court of federal claims exclusive jurisdiction over contract claims against the government. *See, e.g.*, 9 F.3d at 1432, Appendix "B," App. 10; *North Side*, 753 F.2d at 1485; *Transohio*, 967 F.2d at 612. However, in *Bowen*, this Court rejected that assumption and noted that Tucker Act jurisdiction is not exlusive. 487 U.S. at 910 n. 48. After *Bowen*, the Tucker Act should not be read to "impliedly forbid" a district court from taking jurisdiction under the APA over contract-related claims seeking equitable relief. Yet without further direction from this Court, at least two courts of appeals have refused to overrule existing circuit precedent to the contrary. 14 F.3d at 38, Appendix "A," App. 5; *Transohio*, 967 F.2d at 613.

This Court's decision in *Bowen* clearly places into doubt the Ninth Circuit's decision in this case.

2. Despite petitioner's contentions that the United States violated statutory and Constitutional mandates in citing an erroneous statutory reference in the Outlease, the Ninth Circuit concluded that petitioner's claim was contractually based and thus was impliedly precluded by the Tucker Act. In reaching that conclusion, the Ninth Circuit relied on its earlier decision in *North Side*, and the District of Columbia Circuit's decision in *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967-78 (D.C. Cir. 1982). In *North Side*, the Ninth Circuit concluded over a strong dissent

that the plaintiffs' claims seeking to invalidate as impracticable contracts with the United States constituted a "claim against the United States . . . founded . . . upon [an] express or implied contract," 28 U.S.C. § 1346(a)(2), 753 F.2d at 1486. The court therefore concluded that the Tucker Act impliedly precluded the waiver of sovereign immunity set forth in § 702 of the APA. 753 F.2d at 1485.[4] The Ninth Circuit's conclusions prohibiting district court jurisdiction over purportedly contract-related claims but permitting district court jurisdiction over statute-based claims have been followed by other circuit courts. *See, e.g., Transohio; Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986). This contention has never been addressed or considered by this Court and, indeed, finds no support in the language of the Tucker Act.

While numerous decisions hold that contract claims under the Tucker Act must seek money damages in order to be cognizable [*see, e.g., Richardson v. Morris*, 409 U.S. 464, 465 (1973); and *United States v. King*, 395 U.S. 1, 2-3 (1969)], the Tucker "Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law." *United States v. Mitchell*, 463 U.S. 206, 216 (1983). By its literal terms, the Tucker Act provides jurisdiction to the court of federal claims over claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an

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[4] The Ninth Circuit concluded, however, that the plaintiffs' claims that the enforcement of the contracts would violate a specific federal statute did not fall within the implied preclusion and were subject to the jurisdiction of the district court, even though such claims had already been dismissed from the lawsuit. 753 F.2d at 1484-1486.

executive department, or upon any express or implied contract with the United States . . . . " 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1). The reasoning of the Ninth Circuit in this case and in *North Side* (as well as of other circuit courts) drawing a line between contract claims and other types of claims, raises serious questions concerning the extent to which 5 U.S.C. § 702 waives sovereign immunity for claims other than those seeking money damages. As Justice White observed, while dissenting from this Court's refusal to review *North Side*, this reasoning, taken literally, "would also bar a suit for injunctive or declaratory relief against officers of the United States Government founded upon the Constitution, a federal statute, or a federal regulation, even if the claim for declaratory or injunctive relief was not accompanied by a claim for damages." *North Side Lumber Co. v. Block*, 474 U.S. 931, 932 n. 2 (1985). The Ninth Circuit's interpretation, when applied literally, would render the provision of 5 U.S.C. § 702 waiving sovereign immunity against claims other than those seeking money damages "a dead letter." *Id. See also B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 727 (2d Cir. 1983) ("*B.K. Instrument*").

As stated above, this Court in *Bowen* instructed that the line between court of federal claims jurisdiction over claims for money damages under the Tucker Act and district court jurisdiction over claims seeking equitable relief under § 702 was intended to be clean and bright. 487 U.S. at 901, 914-15; *see also B.K. Instrument*, 715 F.2d at 726. Both *Bowen* and *B.K. Instrument* demonstrate that the *existence* of court of federal claims jurisdiction should be necessary to invoke the implied preclusion clause of § 702. In this regard, the purposes of the 1976 amendment

of § 702 of the APA – "to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity" (487 U.S. at 891-892) and to "remove 'technical' obstacles to access the federal courts" (487 U.S. at 896, citation omitted) – will be met without rendering § 702 meaningless. *See Katz v. Cisneros*, 1994 WL 43509 at p. 8 ("the prerequisite to [the impliedly forbids] prohibition, however, is that the statute which forbids the relief sought 'grants consent to suit,' 5 U.S.C. § 702, in this case that some relief be available in the Court of Federal Claims under the Tucker Act.")

Such a regime – which results in district court jurisdiction over claims seeking equitable relief and court of federal claims jurisdiction over claims seeking money damages, regardless of the source of the rights and remedies at stake – would be sensible and faithful to the language of the APA and the Tucker Act. Nothing in the text of the APA or the Tucker Act singles out contract claims for special treatment.

The Ninth Circuit here (14 F.3d at 37, Appendix "A," App. 3) (and in *North Side*) relied on language from *Megapulse, Inc. v. Lewis*, in support of the conclusion that the Tucker Act impliedly forbids a waiver of sovereign immunity of petitioner's claim. The relevant discussion in *Megapulse* concerning the remedial limitations of the Tucker Act is grounded in a concern to preserve the integrity of the court of federal claims' jurisdiction:

> "[T]o allow suit against the United States under the APA in actions actually based on contract would create such inroads into the restrictions of the Tucker Act that it would ultimately result in the demise of the Court of Claims."

672 F.2d at 967 (footnote omitted). The "inroads" being referred to clearly pertain to jurisdiction over contract claims essentially seeking monetary damages. That concern, however, has no applicability here in a suit seeking equitable reformation of contract. As petitioner argued below, it is highly questionable whether the court of federal claims would have jurisdiction over petitioner's claim. That court's jurisdiction, therefore, is not threatened.

3. The Ninth Circuit also erred in ruling that petitioner's reformation claim was based upon a contract. Petitioner does not seek specific performance of the contract; does not allege a contract claim; does not allege that the United States breached a contract; and does not seek any other classic contract remedy. Rather, North Star contends that the United States failed to comply with the mandates of federal statutes and the Constitution in citing in the Outlease the wrong statutory enabling authority. This claim is akin to several other claims that courts – including the Ninth Circuit – have permitted to go forward. *See, e.g., Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376 (9th Cir. 1981); *Adamson v. Radosevic*, 685 F. Supp. 814 (D. Kan. 1988); *Coleman American Moving Services v. Weinberger*, 716 F. Supp. 1405 (M.D. Ala. 1989); *Choctaw Mfg. Co., Inc. v. United States*, 761 F.2d 609 (11th Cir. 1985).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

April, 1994

APPENDIX A

NORTH STAR ALASKA,
Plaintiff-Appellant,

North Star Borough, Intervenor-Appellee,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 92-35082.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 4, 1993.

Submission Withdrawn by En Banc Court
Sept. 3, 1993.

En Banc Opinion Nov. 23, 1993.

Resubmitted To Panel Nov. 23, 1993.

Decided Jan. 18, 1994.

Lessee sued United States seeking reformation of parties outlease. The United States District Court for the District of Alaska, Andrew J. Kleinfeld, J., dismissed for lack of subject matter jurisdiction, and the lessee appealed. The Court of Appeals, 1 F.3d 967, referred the matter to be heard en banc. The Court of appeals, 9 F.3d 1430, remanded to the panel. On remand, the Court of Appeals, Beezer, Circuit Judge, held that claim was founded on contract with United States and thus within Tucker Act and subject to its restrictions on relief where claim was concerned solely with rights created within contractual relationship and had nothing to do with duties arising independently of the contract.

Affirmed.

John Spencer Stewart and Christopher A. Rycewicz, Stewart, Sokol & Gray, Portland, OR, for plaintiff-appellant.

Mary K. Doyle, U.S. Dept. of Justice, Washington, DC, for defendant-appellee.

Mark Andrews, Asst. Borough Atty., Fairbanks, AK, for intervenor-appellee.

Appeal from the United States District Court for the District of Alaska.

Before: WRIGHT, ALARCON, and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

The November 23, 1993 opinion of the court, sitting en banc, concluded:

> We remand to the panel to determine whether North Star's claim is contractually or statutorily based, and any other issues presented by this appeal.

North Star Alaska v. United States, 9 F.3d 1430, 1433 (9th Cir.1993) (en banc). Accordingly, we must determine whether North Star's claim is contractually or statutorily based. Because we conclude that North Star's claim for reformation is concerned solely with contractual rights, we affirm.

I

If a plaintiff's claim is "concerned solely with rights created within the contractual relationship and has nothing to do with duties arising independently of the

contract . . . [the] claim is 'founded . . . upon [a] . . . contract with the United States' and is therefore within the Tucker Act and subject to its restrictions on relief." *North Side Lumber v. Block*, 753 F.2d 1482, 1486 (9th Cir.), *cert. denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985) (citing *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967-68 (D.C.Cir.1982)). *See also Megapulse*, 672 F.2d at 968 ("The classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate).").

North Star argues that its claim for reformation "seek[s] to enforce extracontractual Constitutional and statutory obligations." The jurisdictional issue, however, turns on the "source of the rights upon which the plaintiff bases its claim." *Megapulse*, 672 F.2d at 968. North Star's right to have the Outlease reformed arises only if this was the original intent of the parties.[1] Thus, North Star's right to *reformation* is based upon the contractual agreement

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[1] The equitable remedy of reformation is appropriate "[i]f, by reason of mistake of law, the legal effect of the words in which a contract or conveyance is expressed is different from that on which the parties were agreed." **3 Corbin on Contracts** § 614 (1960).

itself.[2] Under *North Side Lumber,* the district court has no jurisdiction to hear this claim.

II

North Star argues that the district court cannot refuse jurisdiction if there is no alternative forum available to hear North Star's claim. In support, North Star cites *Bowen v. Massachusetts,* 487 U.S. 879, 901, 108 S.Ct. 2722, 2735, 101 L.Ed.2d 749 (1988) ("the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court") and *Marshall Leasing, Inc. v. United States,* 893 F.2d 1096, 1101 (9th Cir.1990) ("The district court should not refuse jurisdiction over an equitable claim on the ground that there is an adequate remedy at law unless there is a forum in which the claim for monetary damages can be heard").

Both *Bowen* and *Marshall,* however, involve interpretations of § 704 of the APA which requires judicial review of "final agency action for which there is no other adequate remedy in a court." *Bowen* could be interpreted

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[2] According to North Star, because the government "has not and cannot" make the findings required by the statute cited in the Outlease, "the parties were mutually mistaken in including in the Outlease the wrong statutory reference." Unless North Star is making a clearly erroneous argument about backwards-causation, its argument must be that the government's failure to comply with § 2667 is *evidence* that a different statute was intended to authorize the Outlease. The claim is not that the government is violating the law, the claim is that the government is following a different law from the one stated in the contract. This, as the district court concluded, is a contractual issue.

as taking a more expansive view of district court jurisdiction under the APA than we have previously recognized. Describing the forms of monetary relief that were not "money damages" and thus were within the scope of § 702, the *Bowen* Court includes " 'equitable actions for monetary relief under a contract.' " *Bowen*, 487 U.S. at 895, 108 S.Ct. at 895 (quoting Judge Bork's opinion in *Maryland Dep't of Human Res. v. HHS*, 763 F.2d 1441, 1446 (D.C.Cir.1985)). This suggests that contract actions seeking equitable relief could be heard in district court under the APA. *Bowen*, however, did not involve a contract and it did not address the "impliedly forbids" limitation on the APA's waiver of sovereign immunity. We therefore agree with the D.C.Circuit that "[w]ithout more certain direction from the Supreme Court, we decline to overrule this Court's very specific holdings that the APA does *not* waive sovereign immunity for contract claims seeking [equitable] relief." *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 613 (D.C.Cir.1992). We also note that it would make little sense to grant jurisdiction over a claim pursuant to § 704 on the ground that jurisdiction for that same claim is expressly or impliedly forbidden under § 702. *See id.* at 608-09.

III

We hold that the APA does not waive sovereign immunity for North Star's contractually based claim for equitable relief. The judgment is

AFFIRMED.

APPENDIX B

NORTH STAR ALASKA,
Plaintiff-Appellant,

North Star Borough, Intervenor-Appellee,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 92-35082.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted
En Banc Oct. 14, 1993.

Decided Nov. 23, 1993.

Lessee sued United States, seeking reformation of parties' outlease. The United States District Court for the District of Alaska, Andrew J. Kleinfeld, J., dismissed for lack of subject matter jurisdiction. Lessee appealed. The Court of Appeals held that remand was required for determination as to whether lessee's claim was contractually or statutorily based.

Remanded to panel.

For panel decision see 1994 WL 9499.

John Spencer Stewart and Christopher A. Rycewicz, Stafford, Frey, Cooper & Stewart, Portland, OR, for plaintiff-appellant.

Mary K. Doyle, U.S. Dept. of Justice, Washington, DC, for defendant-appellee.

Mark Andrews, Asst. Borough Atty., Fairbanks North Star Borough, AK, for intervenor-appellee.

Appeal from the United States District Court for the District of Alaska.

Before: WALLACE, Chief Judge, FLETCHER, FARRIS, POOLE, BEEZER, HALL, WIGGINS, O'SCANNLAIN, FERNANDEZ, RYMER, and T.G. NELSON, Circuit Judges.

PER CURIAM:

North Star Alaska Housing Corporation (North Star) brought this action in district court seeking reformation of an Outlease it had entered into with the United States Army. The district court determined that it had no jurisdiction and dismissed the complaint without prejudice. North Star timely appeals. We have taken this case en banc to resolve a conflict between *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.) (*North Side Lumber*), *cert. denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985), and *Lehner v. United States*, 685 F.2d 1187 (9th Cir.1982) (*Lehner*), *cert. denied*, 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 790 (1983).

I

In 1986, North Star and the Secretary of the Army entered into an Outlease under which North Star was permitted to lease a portion of the Fort Wainwright Military Reservation for a period of 32 years. The document stated that 10 U.S.C. § 2667 authorized the Secretary to

enter into the Outlease for the "sole purpose of constructing, operating and leasing 400 units of residential housing." Among other things, the Outlease provided that North Star would be responsible for any taxes assessed against the leased property. North Star and the United States subsequently executed a second lease pursuant to 10 U.S.C. § 2828 by which North Star leased back to the United States the land and several units of residential housing.

When the Fairbanks North Star Borough (Borough) began taxing North Star's interest in the housing project, North Star filed suit in district court seeking reformation of the Outlease. North Star claimed that the contract mistakenly cited 10 U.S.C. § 2667, instead of 10 U.S.C. § 2828, as the statutory authority for the first lease. On appeal, North Star argues that the government "had not and could not" make the required findings pursuant to section 2667 and that, absent reformation by the district court, the Outlease violates both section 2667 and article IV, section III, clause 2 of the United States Constitution. North Star concedes the purpose of the suit is to "escape . . . the payment of taxes to the Borough."

Believing its ability to tax the property would be placed in jeopardy if the court granted reformation, the Borough sought and was granted leave to intervene. Subsequently, both the United States and the Borough moved to dismiss North Star's complaint for lack of subject matter jurisdiction. The district court granted the motion to dismiss on the ground that North Star's prayer for equitable relief was contractual in nature and, according to our decision in *North Side Lumber*, was barred under the doctrine of sovereign immunity.

II

Subject matter jurisdiction determinations are subject to de novo review. *United States v. Triple A Machine Shop*, 857 F.2d 579, 583 (9th Cir.1988).

North Star may sue the United States only if Congress has waived sovereign immunity for the lawsuit, and may bring its claim in federal district court only if Congress has provided for jurisdiction there. *North Side Lumber*, 753 F.2d at 1484; *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 606 (D.C.Cir.1992) (*Transohio*).

North Star argues that the federal-question statute, 28 U.S.C. § 1331, and the Administrative Procedure Act, 5 U.S.C. § 702, provide both federal district court jurisdiction and a waiver of sovereign immunity. We confront the question whether Congress has waived immunity.

The government argues that the Tucker Act "expressly or impliedly" forbids the kind of relief North Star is seeking in the district court. The Tucker Act, which waives sovereign immunity and provides for claims court jurisdiction over certain claims, states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Under the "Little Tucker Act," the district court has concurrent jurisdiction with the claims

court for actions not exceeding $10,000. 28 U.S.C. § 1346(a)(2); *Price v. United States Gen. Serv. Admin.*, 894 F.2d 323, 324 (9th Cir.1990) (*Price*).

Generally speaking, the Tucker Act does not permit the claims court to grant equitable or declaratory relief in a contract dispute case. *See United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States v. Jones*, 131 U.S. 1, 9 S.Ct. 669, 33 L.Ed. 90 (1889); *Transohio*, 967 F.2d at 608; *cf.* 28 U.S.C. § 1491(a)(2), (3) (authorizing equitable relief in limited circumstances). Similarly, the Little Tucker Act does not specifically authorize the district court to grant declaratory or equitable relief against the United States in contract cases. *Price*, 894 F.2d at 324; *North Side Lumber*, 753 F.2d at 1485. However, the district court does have jurisdiction to hear claims for equitable relief which "rest[ ] at bottom on statutory rights." *North Side Lumber*, 753 F.2d at 1485 (construing *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376 (9th Cir.1981), and *Rowe v. United States*, 633 F.2d 799 (9th Cir.1980), *cert. denied*, 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981)). To the extent that *North Side Lumber* conflicts with our earlier decision in *Lehner*, 685 F.2d at 1190, we reject *Lehner* and adopt the reasoning of *North Side Lumber*.

The Supreme Court's opinion in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), upon which North Star relies, does not affect our analysis. *Bowen* involved section 704 and was not a contract case. Accordingly, the Court was not called upon to address section 702's "impliedly forbids" limitation on the waiver of sovereign immunity.

We remand to the panel to determine whether North Star's claim is contractually or statutorily based, and any other issues presented by this appeal.

REMANDED TO PANEL.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTH STAR ALASKA, Plaintiff-Appellant, NORTH STAR BOROUGH, Intervenor-Appellee, -vs- UNITED STATES OF AMERICA, Defendant-Appellee.	No. 92-35082 D.C. No. CV-89-00018-AJK ORDER

(Filed September 2, 1993)

Before: WALLACE, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTH STAR ALASKA, Plaintiff-Appellant, NORTH STAR BOROUGH, Intervenor-Appellee, -vs- UNITED STATES OF AMERICA, Defendant-Appellee.	No. 92-35082 D.C. No. CV-89-00018-AJK ORDER

(Filed September 3, 1993)

Before: WALLACE, Chief Judge.

This case has been assigned to an en banc court. Submission of this case to the three-judge panel is therefore withdrawn.

APPENDIX E

JUDGEMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-35082
CT/AG#: CV-89-00018-AJK

NORTH STAR ALASKA;

Plaintiff-Appellant

NORTH STAR BOROUGH

Intervenor-Appellee

v.

UNITED STATES OF AMERICA

Defendant-Appellee

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered January 18, 1994.

APPENDIX F

* * *

[p. 43] MR. COOPER: Thank you, Your Honor.

THE COURT: I'll rule at this time. This case is so difficult that the last time we had a hearing, I was sure we must have all just missed a chapter in our treatise. But evidently, that's not so, it's just a real difficult case. For the Court to have jurisdiction, the United States has to have waived its sovereign immunity with respect to claims such as the one urged, and Congress has to have conferred jurisdiction on the District Courts. The source urged for jurisdiction is 5 U.S.C. section 702. North Star Housing claims that it is a person suffering legal wrong because the agency action; namely, the agency's citation of the wrong statute in the out-lease. That statute specifically says that an action in a court of the United States, which the District Court is, seeking relief other than money damages, which this is; it seeks relief, and relief sought is not money damages, and stating a claim that an agency acted, and this complaint does – cannot be dismissed on the ground that it is against the United States. That's the ground urged. The question is applicability of the proviso. Section 702 has a proviso that nothing in it confers authority on the District Court to grant relief if any other statute that grants consent to sue impliedly forbids the relief. That sends us to 28 U.S.C. 1346. 28 U.S.C. 1346 is a statute, and it grants consent to suit against the United States. So the question is whether 28 U.S.C. 1346 expressly or impliedly [p. 44] forbids the relief which is sought: reformation by the District Court.

28 U.S.C. 1346 gives the District Courts jurisdiction concurrent with the Claims Court of civil actions or claims not exceeding $10,000 in amount, founded upon a statute, or the Constitution, or a contract, with an exception for claims founded upon a contract which are subject to the Contract Disputes Act. The Contract Disputes Act exception provides that all claims by a contractor relating to a contract shall be submitted to the contracting officer for a decision. The real question here is whether the 28 U.S.C. 1346 consent to liability impliedly forbids the relief sought: the reformation. The law of this Circuit, as established by *Northside Lumber* 753 F.2d 1482 is that Tucker Act impliedly forbids declaratory and injunctive relief and precludes a section 702 waiver of sovereign immunity in suits on Government contracts. *Northside* distinguishes cases where the claims are related to a contract but rest on – at bottom on statutory rights. It holds that the District Court has jurisdiction over claim that enforcement of a contract would violate a statute, but does not have jurisdiction over a claim that the contract is void for impracticality, frustration, or impossibility. The subsequent decision in *Price* at 894 F.2d 323, likewise follows *Northside* and holds that the District Courts do not have jurisdiction to grant declaratory or equitable relief against the United States, even if the theory of the action is 5 U.S.C. section [p. 45] 702. The case is distinguishable, because it is pre-award and section 149- – 28 U.S.C. section 1491 also distinguishes between pre-award contractual relief and post-award contractual relief and provides for exclusive jurisdiction in the Claims Court for pre-award contractual relief. The decision though in *Price*

states that the Court does not need to reach that provision, because the District Court lacked jurisdiction for the more fundamental reason that the United States had not consented to equitable relief of the kind plaintiff requested. Thus, the factual distinction of *Price* appears not to be a tenable legal distinction, because of the ratio decidendi in *Price. Lanner* [sic] at 685 F.2d 1187, seems to reach the opposite – a result opposite to *Northside.* It is very hard to reconcile them, except by the theory that defendants offer that in *Lanner* [sic], the holding was not really a decision on the jurisdictional issue at all, because the merits were easier than jurisdiction. I think that the defense is correct in saying that the claim is, in substance, based on contract. A claim for reformation is in substance a claim that the parties have a contract not correctly reflected in the written memorialization of the contract, so the written memorialization needs to be reformed in order to reflect what was truly agreed upon between the parties. It is hard to see what standing North Star would have to assert interests under the statutes argued, except insofar as a claims of right, based upon a contract.

[p. 46] The conclusion that I reach is that the case is essentially contractual in nature. Because of that, the limitations on the waiver of sovereign immunity in 1346(a)(2) apply. The relief sought is equitable. I think that the Contract Disputes Act would apply, which puts it in the Contract Disputes Act exception to 1346, even if 1346 would otherwise give the District Court jurisdiction. It is possible that the Claims Court has jurisdiction incident to the claims for money damages, which are being asserted in a parallel action now pending before the

Claims Court. The matter is not clear. *Bowen versus Massachusetts* certainly gives rise to doubt, but the procedural context of *Bowen* and the factual context is quite distinguishable. It's not a private contract dispute like this one. It has long been the laws, at least since *Millikin and Printing* (ph.) at 202 U.S. 168, that the Court of Claims has jurisdiction to reform a Government contract in connection with a claim for money upon the contract. This Court has authority under 28 U.S.C. 1631, if it finds there is a want of jurisdiction, to transfer the action in the interests of justice, to any other court in which the action could have been brought. What I am going to do is dismiss unless North Star Housing suggests that in the interests of justice, the case should be transferred. My concern is I'd like to facilitate appeal, because the room for error is so great here. It's such a – it's such a perplexing area, particularly because it's so hard [p. 47] to reconcile *Lanner* [sic] with *Northside Lumber*, so I'd like to facilitate appeal. However, if you're going to have a statute of limitations problem or some other problem that a dismissal would create for you, I will transfer the action to the Court of Claims, so that you don't suffer that detriment. If you need to think about this, you can, or if you're prepared to advise me now, we can proceed that way.

MR. STEWART: I would prefer to think about it, Your Honor –

THE COURT: All right.

MR. STEWART: – if we can.

THE COURT: Why don't you just submit – let's see, how shall we do this? Why don't we provide that the case will be dismissed, and the Clerk is directed to issue an

order dismissing the case in – what do you want? Ten days? Thirty days?

MR. STEWART: Thirty days would be fine.

THE COURT: In thirty days, unless prior to that time, North Star Housing has filed a motion for transfer to the Court of Claims. If such a motion is filed, I would expect to grant it. I say that, because that may help the defendants decide whether to just stipulate to it to get it resolved quickly. Thank you, counsel.

(Adjourned at 5:20 p.m.)

END OF PROCEEDINGS

APPENDIX G

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

NORTH STAR ALASKA HOUSING CORP. vs. UNITED STATES OF AMERICA ET AL THE HONORABLE ANDREW J. KLEINFELD CASE NO. F89-018 CIVIL

Deputy Clerk Tom Mize

PROCEEDINGS: MINUTE ORDER FROM CHAMBERS:

Pursuant to the Court's order at oral argument on April 11, 1991, and North Star Alaska Housing Corp. having failed to file a motion for transfer to the Court of Claims, this case is dismissed without prejudice. All motion [sic] currently pending are denied as moot.

DATE: *June 20, 1991* DEPUTY CLERK'S INITIALS: *trm*

C.F. No. 1

APPENDIX H

David H. Call
Martina Kang Ravicz
CALL, BARRETT & BURBANK
711 Gaffney Road
Fairbanks, Alaska 99707

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTH STAR ALASKA HOUSING CORPORATION, an Alaska Corporation, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	F89 18 CIV

COMPLAINT FOR REFORMATION

(Filed April 19, 1989)

1. Jurisdiction is conferred on this Court by the Constitution of the United States, Article IV, Section III, Clause 2; U.S.C., Title 28, Section 1331 and by U.S.C., Title 5, Section 702.

2. Plaintiff North Star Alaska Housing Corporation ("North Star") is an Alaska corporation.

3. On June 26, 1986, the United States Army and North Star entered into an Outlease, Contract Number DACA85-1-86-71. This Outlease is stated to be pursuant to 10 U.S.C. 2667, and provides for:

1) the lease of federal property on Fort Wainwright to North Star for a term of 32 years, beginning June 26, 1986, for the sole purpose of constructing, operating and leasing 400 units of residential housing; and

2) the construction of 400 military housing units pursuant to an Agreement to Lease, executed that same day and incorporated in the Outlease.

4. North Star and the United States have also executed a Lease, Contract No. DACA85-5-88-17, in which North Star leases the same government land and the improvements to the United States for 19 years and 6 months for immediate occupancy by the United States Army. Copies of the Outlease and Lease are attached hereto as, respectively, Exhibits "A" and "B."

5. Section 2667, Title 10, United States Code, does *not* authorize the United States to enter into the Outlease with North Star. There is no authority conferred by that statute for the first 20 years of the term of the Outlease plus the construction period, nor is there authority for the remainder of the term should the Lease be renewed, because, among other matters:

1) the required finding that federal land leased under that section be "not for the time needed for public use" cannot be made; and

2) the Secretary of the Army has not made the determination required by 10 U.S.C. 2667(b)(1), that a lease for a term more than 5 years in duration will promote the national defense or be in the public interest; and

3) the Secretary of the Army has not made the determination required by 10 U.S.C. 2667(b)(3), that the

omission of a provision in the Outlease permitting the Secretary to revoke the Outlease at any time will promote the national defense or be in the public interest.

6. The only statutory authority for the Outlease is

1) Section 2828(g), Title 10, United States Code, for the first 20 years plus the construction period, and for the remaining term if the Lease is renewed; and

2) Section 2667, Title 10, United States Code, for the remaining term if the Lease is not renewed.

7. Because of the erroneous action of the Secretary of the Army in stating that 10 U.S.C. 2667, rather than 10 U.S.C. 2828(g), is the authority for the first 20 years (plus the construction period) of the Outlease, North Star has and is suffering legal wrong and is adversely affected and aggrieved in that the Fairbanks North Star Borough has and is assessing real property taxes against North Star for its interest in the Fort Wainwright 801 housing project, contrary to Congressional intent as embodied in 10 U.S.C. 2828(g).

8. The parties were mutually mistaken that 10 U.S.C. 2828(g), and not 10 U.S.C. 2667, is the authority for the first 20 years (plus the construction period) of the Outlease and for the remaining term if the Lease is renewed.

WHEREFORE, Plaintiff prays for reformation of the Outlease to provide that the Outlease is authorized under 10 U.S.C. 2828(g) for the first 20 years (plus the construction period) and for the remaining term if the Lease is renewed, and under 10 U.S.C. 2667 at the expiration of the Lease if the Lease is not renewed.

DATED this 19th day of April, 1989 at Fairbanks, Alaska.

CALL, BARRETT & BURBANK
Attorneys for Plaintiff

By /s/ D Call
David H. Call

By /s/ Ravicz
Martina Kang Ravicz

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

(2)

No. 93-1625

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTH STAR ALASKA HOUSING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND FAIRBANKS NORTH STAR BOROUGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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16 pp

QUESTION PRESENTED

Whether the Administrative Procedure Act, 5 U.S.C. 702, waives the federal government's sovereign immunity for a claim seeking reformation of a government contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1625

NORTH STAR ALASKA HOUSING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND FAIRBANKS NORTH STAR BOROUGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the district court (Pet. App. 20) is unreported. The opinion of the en banc court of appeals (Pet. App. 6-11) is reported at 9 F.3d 1430. The decision of the panel (Pet. App. 1-5), on remand from the en banc court, is reported at 14 F.3d 36.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1994. The petition for a writ of certiorari was filed on April 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, petitioner and the Secretary of the Army entered into an Outlease that allowed petitioner to lease a portion of the Fort Wainwright Military Reservation in Alaska for a period of 32 years. Pet. App. 7. The document stated that 10 U.S.C. 2667 authorized the Secretary to enter into the Outlease for the "sole purpose of constructing, operating and leasing 400 units of residential housing." Pet. App. 7-8. Among other things, the Outlease provided that petitioner would be responsible for any taxes assessed against the leased property. *Id.* at 8. Petitioner and the United States subsequently entered into a second lease pursuant to 10 U.S.C. 2828. Under that lease, petitioner leased the land and the residential housing back to the United States for a period of 19 years and six months. Pet. App. 8, 22.

2. When the Fairbanks North Star Borough (respondent Borough) began taxing petitioner's interest in the housing project, petitioner filed suit in district court against the United States seeking reformation of the Outlease. Pet. App. 8. Petitioner asserted that the district court had jurisdiction over the case pursuant to Article IV, § 3, Clause 2 of the U.S. Constitution, 28 U.S.C. 1331 and 5 U.S.C. 702. Pet. App. 21. Petitioner claimed that the Outlease mistakenly cited 10 U.S.C. 2667 instead of 10 U.S.C. 2828 as its statutory authority. Pet. App. 22-23. Petitioner accordingly requested that the Outlease be reformed to provide "that the Outlease is authorized under 10 U.S.C. 2828(g) for the first 20 years (plus the construction period) and for the remaining term if the Lease is renewed, and under 10 U.S.C. 2667 at

the expiration of the Lease if the Lease is not renewed." Pet. App. 23.[1]

Respondent Borough sought and was granted leave to intervene as a defendant. Pet. App. 8. Thereafter, both respondents moved to dismiss the complaint for lack of subject matter jurisdiction. *Ibid.* The district court granted the motions. *Id.* at 8, 20. It held that 5 U.S.C. 702, the provision of the Administrative Procedure Act that petitioner relied upon as waiving the United States' sovereign immunity, does not authorize district courts to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief sought. Pet. App. 15. Relying on *North Side Lumber Co.* v. *Block*, 753 F.2d 1482 (9th Cir.), cert. denied, 474 U.S. 919, 931 (1985), the district court held that the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491(a)(1), "impliedly forbids declaratory and injunctive relief and precludes a section 702 waiver of sovereign immunity in suits on Government contracts." Pet. App. 16. The district court concluded that petitioner's claim was contractual, stating that "[a] claim for reformation is in substance a claim that the parties have a contract not correctly reflected in the written memorialization of the contract, so the written memorialization needs to be reformed in order to reflect what was truly agreed upon between the parties." *Id.* at 17. The court accordingly found that the claim was not cognizable under the Administrative Procedure Act. The district court recognized that this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), "certainly gives rise to doubt, but the procedural context

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[1] In petitioner's view, if 10 U.S.C. 2828 is the statutory basis for the Outlease, respondent Borough would not be permitted to assess taxes on petitioner's interest in the leased property and buildings.

of *Bowen* and the factual context [here] is [*sic*] quite distinguishable." Pet. App. 18.

3. Petitioner appealed. After oral argument, but before the panel issued a decision, the Ninth Circuit ordered that the case be reheard en banc to resolve an intra-circuit conflict on whether district courts have jurisdiction over contract claims. Pet. App. 12; *id.* at 7. In a per curiam opinion, the en banc court reaffirmed its prior decision in *North Side Lumber Co.*, which had held that the Administrative Procedure Act does not allow district courts to exercise jurisdiction over equitable claims against the government based on contract rights, as opposed to those based on statutory rights. Pet. App. 10. The en banc court also ruled that this Court's decision in *Bowen* did not affect the analysis because *Bowen* "was not a contract case. Accordingly, the Court was not called upon to address section 702's 'impliedly forbids' limitation on the waiver of sovereign immunity." *Ibid.* The en banc court remanded the case to the panel for determination of whether petitioner's claim was contractually or statutorily based. *Id.* at 11.

4. On remand, the panel concluded that petitioner's claim was contractual and affirmed the district court's decision to dismiss the case. Pet. App. 5. The court of appeals reached its decision by examining the source of the rights upon which the petitioner based its claim. *Id.* at 3. The court ruled that petitioner's right to have the Outlease reformed arose only if that was the original intention of the parties. Since petitioner's right to reformation was therefore based upon the contract, the district court lacked jurisdiction to hear that claim. *Id.* at 3-4.

The court of appeals rejected petitioner's argument that it had asserted a statutory claim. Pet. App. 4 n.2. The court also rejected petitioner's argument, based in

part on *Bowen*, that the district court could not refuse jurisdiction if there was no alternative forum available to hear petitioner's claim. *Id.* at 4-5. The court noted that *Bowen* involved the interpretation of Section 704 of the APA, which requires judicial review of "final agency action for which there is no other adequate remedy in a court." Pet. App. 4, quoting 5 U.S.C. 704. The court also recognized that *Bowen* "did not involve a contract and it did not address the 'impliedly forbids' limitation on the Administrative Procedure Act's waiver of sovereign immunity." Pet. App. 5. The court stated that "it would make little sense to grant jurisdiction over a claim pursuant to § 704 on the ground that jurisdiction for that same claim is expressly or impliedly forbidden under § 702." *Ibid.*

ARGUMENT

1. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Moreover, when the government does consent to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), citing *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941), and any waiver of sovereign immunity must be strictly construed. *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992).

a. The Tucker Act provides a waiver of sovereign immunity for claims against the United States "founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1346(a)(2), 1491(a)(1). Tucker Act jurisdiction is limited to claims for monetary relief, see *Richardson* v. *Morris*, 409 U.S. 464, 465 (1973) (per curiam), and equitable claims may be heard under the

Tucker Act only in conjunction with such money claims, see *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1316-1317 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979). The Administrative Procedure Act (APA) waives the government's sovereign immunity for claims seeking "other than money damages." 5 U.S.C. 702. However, Section 702 of the APA notes a specific exception: in circumstances in which another statute "expressly or impliedly forbids" the relief being sought, the government's sovereign immunity is not waived.

In construing the "impliedly forbids" proviso of Section 702, the court of appeals reaffirmed the principle that district courts do not have jurisdiction to order equitable relief based on government contracts, because such relief is impliedly forbidden by the Tucker Act. See *North Side Lumber Co.* v. *Block*, 753 F.2d 1482 (9th Cir.), cert. denied, 474 U.S. 919, 931 (1985). The other courts of appeals that have addressed this question are in accord. See, *e.g.*, *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *Eagle-Picher Indus., Inc.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise made by agency not within district court's jurisdiction); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) ("The sole remedy for an alleged breach of contract by the federal government is a claim for money damages.").[2]

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[2] Petitioner errs in asserting (Pet. 11) that there is a conflict between the decision of the court of appeals in this case and the Federal Circuit's decision in *Katz* v. *Cisneros*, 16 F.3d 1204 (Fed.

b. Petitioner nonetheless asserts that the court of appeals' decision conflicts with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, the State of Massachusetts sued the Secretary of Health and Human Services (HHS), seeking reimbursement for a category of expenditures under the State's Medicaid program. This Court first held that the APA's exclusion of actions for "money damages" in Section 702 did not bar an order reversing an agency decision premised on a misinterpretation of the law and disallowing benefits mandated under a federal statute. 487 U.S. at 900. This Court then addressed whether the Court of Federal Claims could provide an adequate remedy and whether review in the district court would therefore be precluded on the basis of Section 704, which bars judicial review of "final agency action" if there is "[an]other adequate remedy in a court." 5 U.S.C. 704. This Court found that there was no other adequate remedy for the statutory claim raised in *Bowen*, and that judicial review was therefore not precluded by Section 704. 487 U.S. at 901.

As the court of appeals below and other circuits have recognized, *Bowen* was not a contract case, but involved review of final agency action interpreting a statute.[3] Pet. App. 5, 10; *Transohio Sav. Bank* v. *Director, Office of*

Cir. 1994). In *Katz*, the plaintiff had pleaded various contract claims, but in fact did not have a contract with, nor was it a third-party beneficiary of a contract with, the United States. The *Katz* court explicitly stated that the case before it was "not a contract case." 16 F.3d at 1209. It also stated that "[t]o the extent that [plaintiff] has raised contract claims against HUD in its complaint, contract remedies are not available." *Id.* at 1210.

[3] The claim in *Bowen* turned on the interpretation of a federal statute that required HHS to reimburse certain state expenditures for rehabilitative services for the mentally retarded. 487 U.S. at 885-886 & n.6.

Thrift Supervision, 967 F.2d 598, 611-613 (D.C. Cir. 1992); *Coggeshall Dev. Corp.* v. *Diamond*, 884 F.2d 1, 5 (1st Cir. 1989); *Eagle-Picher Indus., Inc.*, 901 F.2d at 1532 n.1. Accordingly, in *Bowen* this Court did not address the question of whether the Tucker Act "expressly or impliedly forbids" equitable relief based on a contract so as to preclude judicial review under Section 702's narrow exception. There is thus no inconsistency between the court of appeals' decision in this contract case and the decision in *Bowen*.[4]

c. Petitioner also asserts (Pet. 12-13) that *Bowen*'s teachings "should apply with equal or greater force where a litigant seeks equitable relief unavailable before the court of federal claims and must litigate in district court or not at all." Petitioner essentially suggests that, unless it has an adequate remedy in the Court of Federal Claims, it must be able to obtain judicial review in the district court under the APA.

Although Section 702 provides generally for the waiver of the government's sovereign immunity in actions seeking "other than money damages," the final sentence of Section 702 provides an exception for situations in which "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." At the same time, Section 704 generally precludes judicial review of "final agency action for which there is [an] adequate remedy in a court." The language and structure of the statute, as well as this Court's decision in *Bowen*, indicate that Section 704 is not an

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[4] Petitioner is correct in its assertion (Pet. 10) that both the court below and the D.C. Circuit have stated that they would not overrule their pre-*Bowen* decisions without more direction from this Court. There is, however, no conflict among the circuits on this question that this Court needs to resolve at this time.

independent waiver of sovereign immunity, but is meant to provide a limitation on Section 702's general waiver. Section 704's "primary thrust * * * was to codify the exhaustion requirement," but it also "makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. There is no indication that Section 704 in any way overrides Section 702's "expressly or impliedly forbids" exception.[5]

---

[5] Petitioner also asserts (Pet. 11) that the court of appeals' decision failed to "correctly interpret the extent of the waiver of sovereign immunity intended by Congress when it amended 5 U.S.C. § 702 in 1976." The legislative history of the 1976 amendments to the APA, however, fully supports the decision reached by the court below. In fact, that legislative history uses equitable relief on a contract as the example of relief unavailable under the APA:

> Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.

H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12-13 (1976) (footnote omitted).

2. Petitioner also argues (Pet. 19) that the court of appeals erred in holding that petitioner's claim was contractual. As the court of appeals understood, to determine whether a claim is contractual or statutory a court must consider the nature of the rights that are asserted and the type of relief that is sought or is appropriate. See *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982). This inquiry necessarily turns on the particular facts of each case. For this reason, even if the court of appeals had erred in characterizing petitioner's claim as "contractual," further review would not be warranted.

In any event, the court of appeals' determination was correct. As the court of appeals recognized, petitioner seeks "reformation" of the Outlease to avoid liability for property taxes. Pet. App. 8. The obligation that petitioner seeks to avoid accordingly arose out of its contractual relationship with the United States.[6] Further, as the court of appeals also recognized, the remedy petitioner seeks is contractual in nature. Reformation is an equitable remedy intended to "reframe written contracts to reflect accurately [the] real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by [the] other party, the writing does not embody [the] contract as actually

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[6] Petitioner wrongly describes (Pet. 11) the court of appeals' decision as holding that the district court lacked APA jurisdiction to review petitioner's claim asserting statutory and constitutional violations "simply because that claim involves a contract with the United States." The *presence* of a contract, however, was not determinative. Rather, the court of appeals looked to the source of petitioner's rights, which in this case was the contract, and rejected petitioner's argument that it had alleged a statutory violation.

made." *Black's Law Dictionary* 1281 (6th ed. 1990). See also *American President Lines, Ltd.* v. *United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987).

Contrary to petitioner's assertions (Pet. 19), petitioner has not alleged constitutional and statutory violations. The only reference to the Constitution in the complaint was to Article IV, § 3, Clause 2, which was cited as a basis for jurisdiction.[7] With regard to petitioner's claims of statutory violations, the court of appeals correctly stated that petitioner's "argument must be that the government's failure to comply with [10 U.S.C.] 2667 is *evidence* that a different statute was intended to authorize the Outlease. The claim is not that the government was violating the law, the claim is that the government is following a different law from the one stated in the contract." Pet. App. 4 n.2.[8]

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[7] That clause provides that

> [t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[8] Petitioner argues (Pet. 19) that courts have allowed claims "akin" to its reformation claim to be heard in district court. Of the four decisions cited by petitioner, two were decided by appellate courts. One of those, *Laguna Hermosa Corp.* v. *Martin*, 643 F.2d 1376 (9th Cir. 1981), was decided by the Ninth Circuit. Even assuming a conflict between Ninth Circuit decisions, further review in this Court would not be warranted. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). The other appellate decision, *Choctaw Mfg. Co.* v. *United States*, 761 F.2d 609 (11th Cir. 1985), involved a suit brought by an unsuccessful bidder, who by definition had no contract with the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1993

NORTH STAR ALASKA HOUSING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, and
FAIRBANKS NORTH STAR BOROUGH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT FAIRBANKS NORTH STAR BOROUGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tucker Act, 28 U.S.C. § 1346(a)(2), impliedly forbids the United States district court from taking jurisdiction over a private party's claim against the United States alleging mutual mistake of fact in the formation of a contract and seeking reformation of the contract.

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APPENDIX

Project Lease, Article VI 1a

No. 93-1625

In The

Supreme Court of the United States

October Term, 1993

NORTH STAR ALASKA HOUSING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, and
FAIRBANKS NORTH STAR BOROUGH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT FAIRBANKS NORTH STAR BOROUGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Fairbanks North Star Borough ("Borough") opposes the petition for certiorari filed by North Star Alaska Housing Corporation. For the reasons set forth herein, the Borough requests the Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

1. Opinion of the Ninth Circuit three-judge panel, January 18, 1994. *North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994), Pet. App. 1-5.

2. Opinion of the Ninth Circuit, *en banc*, November 23, 1993. *North Star Alaska v. United States*, 9 F.3d 1430 (9th Cir. 1993), Pet. App. 6-11.

3. Oral decision of the district court, April 11, 1991. *North Star Alaska Housing Corp. v. United States*, Case No. F89-018 Civ. (Kleinfeld, J.). Pet. App. 15-19.

JURISDICTION

This jurisdiction of this Court is based upon 28 U.S.C. § 1254(1), relating to writs of certiorari to a court of appeals upon petition of a party. The petition for a writ of certiorari was filed on April 15, 1994.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

5 U.S.C. § 702 provides, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal

> authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

10 U.S.C. § 2667 provides, in pertinent part:

> (a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is –
>
> (1) under the control of the department;
>
> (2) not for the time needed for public use; and
>
> (3) not excess property, as defined by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).
>
> (b) A lease under subsection (a) –
>
> (1) may not be for more than five years, unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest;
>
> . . . .
>
> (3) must permit the Secretary to revoke the lease at any time, unless he determines that the omission of such a provision will promote the national defense or be in the public interest . . . .

10 U.S.C. § 2828(a) provides:

> (1) Subject to paragraph (2), the Secretary of the military department concerned may lease housing facilities at or near a military installation in the United States, Puerto Rico, or Guam for assignment, without rental charge, as family housing to members of the armed forces and for assignment, with fair market rental charge, as family housing to civilian employees of the Department of Defense stationed at such installation.
>
> (2) A lease may only be made under paragraph (1) if the Secretary concerned finds that there is a shortage of adequate housing at or near such military installation and that –
>
> (A) the requirement for such housing is temporary;
>
> (B) leasing would be more cost effective than construction or acquisition of new housing;
>
> (C) family housing is required for personnel attending service school academic courses on permanent change of station orders;
>
> (D) construction of family housing at such installation has been authorized by law but is not yet completed; or
>
> (E) a military construction authorization bill pending in Congress includes a request for authorization of construction of family housing at such installation.

10 U.S.C. § 2828(g) provides:

> (1) Notwithstanding any other provision of law, the Secretary of a military department, or

the Secretary of Transportation with respect to the Coast Guard, may enter into a contract for the lease of family housing units to be constructed or rehabilitated to residential use on or near a military installation with the United States under the Secretary's jurisdiction at which there is a validated deficit in family housing. Housing units leased under this subsection shall be assigned, without rental charge, as family housing to members of the armed forces who are eligible for assignment to military family housing. A contract under this section shall include a provision that the obligation of the United States to make payments under the contract in any fiscal year is subject to the availability of appropriations for that purpose.

(2) Each contract under paragraph (1) shall be awarded through the use of publicly advertised competitively bid or competitively negotiated contracting procedures. Such a contract may provide for the contractor of the housing facilities to operate and maintain such housing facilities during the term of the lease.

(3) Each contract under this subsection shall require that housing units constructed pursuant to the contract shall be constructed to Department of Defense specifications.

(4) A contract under this subsection may be for any period not in excess of 20 years (excluding the period required for construction of the housing facilities).

(5) A contract under this subsection shall provide that, upon the termination of the lease period, the United States shall have the right of first refusal to acquire all right, title, and interest

to the housing facilities constructed and leased under this contract.

(6) A contract may not be entered into for the lease of housing facilities under this subsection until –

(A) the Secretary of Defense submits to the appropriate committees of Congress, in writing, an economic analysis (based upon accepted life cycle costing procedures) which demonstrates that the proposed contract is cost effective when compared with alternative means of furnishing the same housing facilities; and

(B) a period of 21 calendar days has expired following the date on which the economic analysis is received by those committees.

(7) Each of the Secretaries concerned may enter into one or more contracts under the subsection for a number of family housing units not exceeding the number specified for that Secretary as follows:

(A) The Secretary of the Army, 6,300.

(B) The Secretary of the Navy, 6,200.

(C) The Secretary of the Air Force, 5,800.

(D) The Secretary of Transportation with respect to the Coast Guard, 900.

(8) A contract may not be entered into under this subsection after September 30, 1991.

(9) A contract for the lease of family housing under this subsection may include provision for the lease of a child care center, civic center building, and similar type buildings constructed for the support of family housing.

28 U.S.C. § 1346(a) provides, in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 . . . .

STATEMENT OF THE CASE

In 1986, petitioner and the Secretary of the Army entered into an Outlease by which petitioner leased certain land on Fort Wainwright Military Reservation, Fairbanks, Alaska. Pet. App. 7; *North Star Alaska v. United States*, 9 F.3d 1430, 1431 (9th Cir. 1993) (en banc). The lease states that 10 U.S.C. § 2667 authorizes the Secretary to enter into the Outlease for the "sole purpose of constructing, operating and leasing 400 units of residential housing." Pet. App. 7-8. The lease also provides that

petitioner is responsible for any taxes assessed against the leased property. Pet. App. 8.

Petitioner and the United States subsequently executed a second lease under former Section 801 of the Military Construction Authorization Act of 1984, 10 U.S.C. § 2828(g).[1] App. 1a. Petitioner leases back to the United States the land and several units of residential housing. Pet. App. 8. Among other things, the lease provides that

> Developer [Petitioner] shall be responsible to pay all taxes, general or special, all public rates, dues, and special assessments of every kind which shall become due and payable or which are to be assessed against or levied upon said Premises during the term of this Lease.

App. 1a. The Borough levies a real property tax on petitioner's private leasehold interest. *North Star Alaska Housing Corporation v. Fairbanks North Star Borough Board of Equalization*, 778 P.2d 1140 (Alaska 1989).

In an effort to "escape . . . the payment of taxes to the Borough," petitioner filed suit in district court, seeking to reform the Outlease to delete and replace the reference to 10 U.S.C. § 2667, which authorizes the taxation of private leaseholds on federal lands. Pet. App. 8, 21; 9 F.3d at

---

[1] Section 801, former 10 U.S.C. § 2828(g), was repealed in 1991 and subsection (h) was redesignated as new subsection (g). Pub.L. No. 102-190, sec. 2806, 105 Stat. 1540 (Dec. 5, 1991). This Brief in Opposition refers to 10 U.S.C. § 2828(g) to mean the former section, as relevant to this proceeding. Since the statute which authorized the military housing has been repealed, a similar case is unlikely to arise in any jurisdiction.

1431-32; *Offutt Housing Company v. County of Sarpy*, 351 U.S. 253 (1956); *North Star, supra*, 778 P.2d at 1142-43. The Complaint alleges no violation of a federal statute or the United States Constitution. Pet. App. 21. Petitioner claims that the Secretary of the Army did not make certain findings under Section 2667, but alleges no violation of that statute. Paragraph 7 of the complaint cites to the federal act authorizing the housing, but alleges no statutory violations; it asserts only that the corporation's property will be free of local taxes if the reference to Section 2667 is removed. Pet. App. 23. The Complaint cites the Constitution only in the first paragraph, as a jurisdictional base. Pet. App. 21.

Petitioner filed the complaint in an attempt to remove its legal duty to pay real property taxes to the Borough. Pet. App. 23, 8; *North Star*, 9 F.3d at 1432. For relief, petitioner asked for equitable reformation of the Outlease to show that Section 2828 is the proper authority for the first twenty years of the lease term, and that Section 2667 is the property authority thereafter. Pet. App. 23.

The Borough was granted leave to intervene. Pet. App. 8. Both the United States and the Borough moved to dismiss for lack of subject matter jurisdiction. The district court dismissed the action on the ground that petitioner's prayer for equitable relief was contractual in nature and barred under the doctrine of sovereign immunity. Pet. App. 8, 20.

Petitioner appealed. After oral argument before a three-judge panel, the Ninth Circuit took the case en banc to resolve an intra-circuit conflict. Pet. App. 7, 12. The full

court heard argument and issued a per curiam opinion, Pet. App. 6, holding that district courts are not authorized to grant equitable relief against the United States in contract cases, although district courts have jurisdiction for claims for equitable relief which are based on statutory rights. Pet. App. 10; 9 F.3d at 1432. The court considered this court's opinion in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) and found it inapplicable because *Bowen* was not a contract case, and therefore did not address the "impliedly forbids" limitations on the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702. Pet. App. 10; 9 F.3d at 1432. The en banc panel remanded to the three-judge panel to determine whether petitioner's claim was contractually or statutorily based. Pet. App. 11; 9 F.3d at 1433.

After remand from the *en banc* panel, the three-judge panel correctly found that petitioner's claim was based on contract and that Section 702 does not waive sovereign immunity for petitioner's claim for equitable relief. Pet. App. 5.

REASONS FOR DENIAL OF THE WRIT

The decision for which review is sought is not in conflict with the decision of another United States court of appeals on the same matter. The Ninth Circuit, *en banc*, held that the Tucker Act "impliedly forbids" the district court from hearing claims against the United States which are based on a federal contract and seek equitable relief. The panel further held that equitable relief remains available in district court for claims based on statute. Pet.

App. 10; 9 F.3d at 1432. This decision is harmonious with decisions in other circuits, which have developed uniform tests for analysis of these questions. The Ninth Circuit opinion is also consistent with *Bowen v. Massachusetts*, 487 U.S. 879 (1988), because of the factual distinctions between the instant case and *Bowen*. Petitioner's Complaint for Reformation asserts a contract claim; the complaint in *Bowen* did not. The instant case involves the "impliedly forbids" language of 5 U.S.C. § 702; *Bowen* did not. The Ninth Circuit *en banc* panel recognized this distinction: "*Bowen* involved section 704 [of the APA] and was not a contract case." Pet. App. 10; 9 F.3d at 1432.

The contractual nature of petitioner's claim shows the firm distinction between the instant case and *Bowen*. In *Bowen*, the State of Massachusetts sued the Secretary of Health and Human Services ("HHS") in district court, seeking reimbursement for certain expenditures under the state's Medicaid program. The claim was based on a federal statute which required HHS to reimburse state expenditures for rehabilitative services. 487 U.S. at 886-87. HHS disallowed payment for certain services as outside the reimbursement requirements of the statute. The district court "reversed" the agency decision. 487 U.S. at 888.

The court of appeals held that there was no jurisdiction under the APA. This Court reversed, holding that although Section 702 did not waive sovereign immunity in actions for "money damages," this exclusion did not bar a claim based on an alleged misinterpretation of a statute and which sought recovery of disallowed benefits mandated by a federal statute. This Court's analysis

focused on the term "money damages" as applied to the relief available under a statutory claim. *Bowen* did not address the jurisdictional principles applicable to claims based on a federal contract.

This Court cast no doubt on the rationale of circuit court decisions which hold that Section 702 bars equitable contract claims not by its exception for "money damages," but by its exception for relief impliedly precluded by other statutes. Because *Bowen* did not involve a contract claim, the "impliedly forbids" preclusion did not apply to the Court's decision.

The Tucker Act, as pertinent, provides:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . .

28 U.S.C. § 1346(a)(2). Section 702 waives the sovereign immunity of the federal government in a variety of circumstances and provides, "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

Petitioner did not bring a claim based on a violation of a statute or the Constitution. Pet. App. 21.[2] Although the Complaint asserts that Section 2667 does not authorize the United States to enter into the Outlease, petitioner simply alleges that this is a misreference by the mistaken parties. Pet. App. 22-23. Petitioner admits that its remedy is "equitable reformation of contract." Pet. 19; *see also* Pet. App. 23.

The Ninth Circuit three-judge panel understood the careful wording of the Complaint:

> According to North Star, because the government "has not and cannot" make the findings required by the statute cited in the Outlease, "the parties were mutually mistaken in including in the Outlease the wrong statutory reference." Unless North Star is making a clearly erroneous argument about backwards-causation, its argument must be that the government's failure to comply with § 2667 is *evidence* that a different statute was intended to authorize the Outlease. The claim is not that the government is violating the law, the claim is that the government is following a different law from the one stated in the contract. This, as the district court concluded, is a contractual issue.

Pet. App. 4; 14 F.3d at 37-38, n. 2 (emphasis in original).

Thus, the Ninth Circuit did not rule that petitioner's Complaint for Reformation should be dismissed on the

---

[2] There was no attempt by petitioner to show that the alleged misreference in the lease is so serious as to violate the Constitution. The Complaint cites the Constitution only as a basis for district court jurisdiction. Pet. App. 21.

sole ground that a contract appeared somewhere in the fact pattern. The Ninth Circuit, and indeed all the circuit courts which have confronted similar questions, looked past superficialities to find the essence of the claim. The jurisdictional issue turns on "the source of the rights upon which the plaintiff bases its claims and the type of relief sought (or appropriate)." Pet. App. 3; 14 F.3d at 37, quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

> If a plaintiff's claim is "concerned solely with rights created within the contractual relationship and has nothing to do with duties arising independently of the contract . . . [the] contract is 'founded . . . upon [a] . . . contract with the United States' and is therefore within the Tucker Act and subject to its restrictions on relief."

Pet. App. 2-3; 14 F.3d at 37. The source of petitioner's rights is contractual, as the parties are said to be mutually mistaken about the contract terms; the relief is contractual, as petitioner seeks reformation.[3] The Tucker Act impliedly forbids the relief which petitioner seeks.

The "source of the rights and type of relief" test has developed into a standard uniformly applied by the circuits. *E.g., Megapulse*, 672 F.2d at 968; *Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed.Cir. 1994); *Region 8 Forest Serv. Timber Purchasers v. Block*, 993 F.2d 800, 807 (11th Cir. 1993); *Amoco Production Co. v. Hodel*, 815 F.2d 352, 362 (5th Cir.

---

[3] The equitable remedy of reformation is appropriate "[i]f, by reason of mistake of law, the legal effect of the words in which a contract or conveyance is expressed is different from that on which the parties were agreed. Pet. App. 3; 14 F.3d at 37, quoting 3 Corbin on Contracts § 614 (1960).

1987) ("essence of the claim"); *Eagle-Picher Industries, Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990). The courts of appeals have not used this standard to arbitrarily expand the jurisdiction of the district court, nor has the Federal Circuit used this test to expand the jurisdiction of the Court of Federal Claims.

Petitioner appears to argue that because the contract/statute distinction does not appear in the literal language of the Tucker Act, this case is sufficiently important to prompt a hearing on the meaning and extent of this distinction. Pet. 15-19. The cases cited by petitioner, including *Bowen*, expressly recognize and apply the distinction between claims based on contract and those based on statute. The instant case does not present a close question of the source of the petitioner's claim nor of the relief requested. There is no compelling reason why this traditional contract case involving a reference in a lease to a subsequently repealed statute should be the vehicle by which decades of federal law is revisited.

The "source of the rights and type of relief" test is also harmonious with *Bowen*. *Bowen* distinguished claims for money damages, a contractual concept, and claims based on statutory mandates, which have the purpose of obtaining entitlements. *Bowen*, 487 U.S. at 891-901. In *Bowen*, the State did not seek "money in *compensation* for the damages sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself. . . . " 487 U.S. at 900 (emphasis in original). Thus, *Bowen*'s analysis paralleled

that of the circuits, recognizing jurisdiction based on the source of the rights and the type of relief sought.

Following *Bowen*, at least four courts of appeals have rejected contentions that equitable claims for contract relief may now be asserted in district court. "*Bowen* was not an action for breach of contract. It was a suit to review agency action which was claimed to be contrary to federal law." *Coggeshall Development Corp. v. Diamond*, 884 F.2d 1, 5 (1st Cir. 1989). "The only remedy to which the United States has consented in cases of breach of contract is to *the payment of money* damages. . . . We are unaware of any waiver of sovereign immunity by the United States as to specific performance for breach of contract." 884 F.2d at 3 (citations omitted, emphasis in original).

The Seventh Circuit held that Section 702 "largely waives the sovereign immunity of the United States in equitable cases," citing *Bowen*, but relief on a contract is precluded by the Tucker Act "which assigns to the Claims Court all actions seeking equitable relief based on a contract with the United States." *Wabash Valley Power v. Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990).

In *Eagle-Picher Industries, Inc. v. United States*, 901 F.2d 1530, 1532, n. 1 (10th Cir. 1990) the Tenth Circuit stated "[u]nlike cases discussed above and the present action . . . the claim in *Bowen* did not relate to a government contract. . . . Such cases must be filed in the Claims Court."

The District of Columbia Circuit reaffirmed the distinction between contract and statutory claims. *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992). In *Transohio*, the bank sued a federal agency for specific

relief and rescission of a contract; some of the issues in the case involved jurisdiction over the various types of claims. The circuit court reviewed the ruling in *Bowen*, as well as the earlier cases on this same point. The court did not alter its earlier rulings on jurisdiction over statutory and contractual claims, because, among other things, "*Bowen* did not involve a contract and it did not address the 'impliedly forbids' limitation on the APA's waiver of sovereign immunity." 967 F.2d at 613.

Transohio contains an extensive, detailed, and thoughtful discussion of the legislative history behind the 1976 amendments to the Tucker Act, which added the "impliedly forbids" language to Section 702, and the judicial developments since that time. The *Transohio* court took care not to give an overly expansive reading to the term "founded upon" a contract. 967 F.2d at 611. The District of Columbia Circuit concluded:

> [Section] 702 of the APA does not waive sovereign immunity for contract actions against the government. Section 702 "is by its terms inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' and the Tucker Act and Little Tucker Act impliedly forbid such relief." Under the cases, the Tucker Act impliedly forbids – in APA terms – not only district court awards of money damages, which the Claims Court may grant, but also injunctive relief, which the Claims Court may not.

967 F.2d at 609 (citations omitted). *Transohio* permitted the statutory claims to go forward in district court, and dismissed the contract claims.

Despite the characterizations of petitioner, *Katz v. Cisneros*, 16 F.3d 1204 (Fed.Cir. 1994), does not create a conflict among the circuits, because the Federal Circuit ultimately ruled that the plaintiff had no contract at all with a federal agency. In *Katz*, a developer had an agreement with the Housing Alliance, a private not-for-profit corporation, for the construction of certain housing for low-income persons. The developer brought suit in district court to challenge the method of calculating rents, and named as defendants the Housing Alliance and the U.S. Department of Housing and Urban Development. The district court dismissed based on the Tucker Act, and transferred the case to the Federal Circuit. The Federal Circuit discussed the Tucker Act and *Bowen*, and ultimately found that the plaintiff housing developer had no contract with a federal agency, but only with a private party. 16 F.3d at 1210.

The *Katz* court's discussion of the Tucker Act does not represent a departure from other circuits. *Katz* recognized the same "source of the rights" test, citing *Transohio*, 16 F.3d at 1209. Further, *Katz* applied fundamentally the same rule as the other circuits: when characterizing a claim, the mere fact that a contract or a statute is involved does not mechanically steer the claim to claims court or district court. *Katz* analyzed the source of the rights and the type of relief sought, and found that the developer sought no more than that provided by statute. 16 F.3d at 1208 ("it is a suit seeking to enforce the statutory mandate itself"). The *Katz* complaint requested prospective relief. 16 F.3d at 1209. The Federal Circuit, as all other circuits considering similar cases, examined the fact that a contract was involved, but ruled that the claims were

statutory and that equitable relief was thus available in district court. This result is consistent with *Bowen*.

This line of cases from five circuits shows that when the "impliedly forbids" language is squarely before the reviewing court on a contract with a federal agency, each court has concluded that Section 702 grants no waiver of sovereign immunity under the Tucker Act as to contract claims, but does so as to statutory claims. This line is consistent with *Bowen*'s ruling that the statutory claims in that case may be heard in district court. The circuits treat the jurisdictional issue consistently; there is no conflict for this Court to resolve.

CONCLUSION

The Fairbanks North Star Borough prays that the United States Supreme Court deny the petition for certiorari filed by the North Star Alaska Housing Corporation.

Respectfully submitted,

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May 1994

APPENDIX

LEASE NO. DACA85-5-88-17
BETWEEN
THE UNITED STATES OF AMERICA
AND
NORTH STAR ALASKA HOUSING CORPORATION

THIS LEASE is made and entered into as of the *6th* day of *November*, 1987, by and between NORTH STAR ALASKA HOUSING CORPORATION (hereinafter referred to as "Developer") and the United States of America represented by the U.S. ARMY ENGINEER DISTRICT, ALASKA (hereinafter referred to as "Government") by virtue of the authority contained in Title 10, United States Code 2828, as amended by Section 801 of Public Law 98-115.

. . .

ARTICLE VI

UTILITIES, RATES, CHARGES, TAXES AND ASSESSMENTS

The Government shall pay all rates and charges which may become payable for water, sewer, gas, electric current, oil or other forms of power, fuel, or utility used or utilized by the Government on the leased Premises during the full term of this Lease. Determination of such charges shall be substantiated by metering or submetering. Developer shall be responsible to pay all taxes, general or special, all public rates, dues, and special assessments of every kind which shall become due and payable or which are to be assessed against or levied upon said Premises during the term of this Lease. The

Developer will allow the Government to deduct and retain out of any rent of said Premises all such sum and sums of money as the Government shall pay on account of such rates, taxes, and assessments, whether the same shall or shall not have accrued, and become payable for or in the respect of the same period out of which the same shall be deducted provided the Government shall give written notice of its intent to so act to the Developer at least thirty (30) days prior to any such payment.

The Developer shall furnish the Government copies of all notices and tax bills which may affect the evaluation of the Premises for general real estate tax purposes or which may affect the levy or assessment of general real estate taxes thereon. Such notices and tax bills shall be delivered or mailed within three (3) days from the receipt thereof by the Developer to the Government's designated representative. The Developer shall cause payment of said general real estate taxes to be made under protest when requested to do so by the Government. The Government may contest the amount or validity of any valuation for general real estate tax purposes or of any levy or assessment of any general real estate taxes by appropriate legal proceedings, either in the name of the Government or the name of the Developer or in the names of both. The Developer, upon reasonable notice and request by the Government, shall join in any such proceedings, but the Developer shall not be subject to any liability for the payment of penalties, costs, or expenses in connection with any proceedings brought by the Government. The Developer shall cooperate with the Government in any such contest or proceeding and execute any documents or

pleadings required for such purpose, provided the Developer shall reasonably be satisfied that the facts and data set forth in such documents or pleadings are accurate.

In addition, if the total general real estate taxes levied during a lease year exceed the total general real estate taxes levied during the second lease year, the increase for that year shall be increased by 80% of the excess and reimbursed by the Government. The amount of increase shall be prorated for each housing unit. General real estate taxes are taxes which are assigned on an *ad valorem* basis, against all taxable real property in the taxing authority's jurisdiction without regard to benefit to the property, for the purpose of funding general governmental services. The term "general real estate taxes" shall exclude any fine, interest, or penalty for nonpayment but shall include any discount offered for prompt payment whether or not the Developer has taken advantage thereof. This increase shall occur only after submission by the Developer of copies of the tax bills, receipts (or other documentary evidence of payment), and a correctly calculated invoice.

. . .

Supreme Court, U.S
FILED
JUN 10 1994
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(4)

93-1625

In The

Supreme Court of the United States

October Term, 1993

NORTH STAR ALASKA HOUSING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, and
FAIRBANKS NORTH STAR BOROUGH,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

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UNITED STATES OF AMERICA, and
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Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

Petitioner North Star Alaska Housing Corporation ("North Star" or "petitioner") filed its Petition for Writ of Certiorari ("petition") on April 15, 1994. Respondents United States of America (the "United States") and Fairbanks North Star Borough (the "Borough") (collectively "respondents"), after obtaining extensions of time, filed their briefs in opposition on or about May 31, 1994 (the United States) and June 1, 1994 (the Borough). Because respondents misapprehend the applicable legal authorities and the importance of the issues, petitioner files this reply brief.

REASONS FOR GRANTING THE WRIT

Respondents fail to demonstrate in their briefs in opposition any justifiable reason why this Court should not accept review and reverse the ruling of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"). In its petition, petitioner contended, *inter alia*, that the Ninth Circuit's decision in this case conflicts with this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) ("*Bowen*"), and the Federal Circuit's decision in *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994) ("*Katz*"). In response, respondents incorrectly assert that neither *Bowen* nor *Katz* has any application to this lawsuit seeking reformation of a contract with the United States. The United States further erroneously argues that the legislative history of the Tucker Act demonstrates that it impliedly forbids equitable relief.

1. Respondents press an unwarranted and overly restrictive reading of *Bowen*. The Ninth Circuit below and other courts of appeals have failed to apply *Bowen* on the ground that it did not involve a contract with the government.[1] Two of those courts, including the Ninth Circuit in this case, expressly concluded that *Bowen* raises doubt about the continued validity of the pre-*Bowen* decisions and invited direction from this Court. 14 F.3d at 38, pet. app. 5; *Transohio Sav. Bank*, 967 F.2d at 611-614. The principles expressed in *Bowen* concerning the broad waiver of

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[1] *See* App. 5, 10; *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 611-613 (D.C. Cir. 1992); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 5 (1st Cir. 1988); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 n. 1 (10th Cir. 1990).

immunity embodied in 5 U.S.C. § 702 should apply in actions based on government contracts.[2]

All of the circuit courts which have held that the Tucker Act impliedly forbids relief on government contract claims rely on one central but faulty assumption – that the United States Court of Federal Claims' Tucker Act jurisdiction is exclusive over contract claims against the government.[3] In *Bowen*, this Court *expressly* rejected that premise:

> "It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. . . . That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction is 'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court."

487 U.S. at 910, n. 48. Thus, this Court reasoned that *nothing* in the language of the Tucker Act precludes other

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[2] While petitioner contends that the Ninth Circuit erred in ruling that petitioner's reformation claim was based upon a contract under the Tucker Act (pet. 19), petitioner will not reiterate that argument in this reply brief. Rather, petitioner will assume for purposes of this reply brief that it pursues a contract claim.

[3] *See* pet. 15; pet. app. 10; *see also North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. den.*, 474 U.S. 931 (1985); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d at 1532; *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986).

courts which have been granted jurisdiction from exercising that jurisdiction. This case presents a federal question; and section 702 of the APA waives sovereign immunity in this action seeking equitable relief.

In *United States v. Mitchell*, 463 U.S. 206, 216 (1983), this Court observed that the Tucker "Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law." Indeed, the express language of the Tucker Act treats claims founded upon "contract" the same as those founded upon "the Constitution, or any Act of Congress, or any regulation. . . . " 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1); pet. 5-6. Justice White correctly and aptly observed while dissenting from this Court's refusal to review the Ninth Circuit's decision in *North Side Lumber Co. v. Block*, 474 U.S. at 932 n. 2, that the argument advanced in this case by the United States (and adopted by the Ninth Circuit and other courts of appeals) would render the provision of 5 U.S.C. § 702 waiving sovereign immunity against claims other than those seeking money damages "a dead letter" if literally applied. *See also B. K. Instrument, Inc. v. United States*, 715 F.2d 713, 727 (2d Cir. 1983). A literal application would prohibit district courts from deciding claims seeking equitable relief based on constitutional, statutory or regulatory violations since the Tucker Act does not permit the Court of Federal Claims to decide such claims.

In *Bowen*, this Court expressly recognized that the 1976 amendment to section 702 was intended to broaden "access to the federal courts." 487 U.S. at 896. Indeed, nothing in this Court's decision in *Bowen* demonstrates that the waiver of sovereign immunity in section 702 or

the nonexclusivity of Court of Federal Claims jurisdiction varies according to whether a claim involves a contract. This Court mentioned "equitable actions for monetary relief under a contract" as an example of a claim that *could* be heard in district court under the APA. 487 U.S. at 895.

This Court should accept review to address the effect of *Bowen* on actions seeking equitable relief filed in district court under the waiver of immunity set forth in section 702 of the APA and involving contracts.

2. The United States ignores, and asks this Court to ignore, the significance of the holding of the Federal Circuit in *Katz*. The United States relies on selected language of the decision taken out of context. As aptly noted by the *Katz* dissent, at the "preliminary stage of litigation," the court "must accept the plaintiff's pleadings at face value"; those "pleadings charge a breach of contract and name the Government's agent as a defendant";[4] and the majority's holding that 5 U.S.C. § 702 of the APA provides jurisdiction is inconsistent with the majority's assertion that "the dispute [was] not between [the plaintiff] and the United States" because the APA "only provide access to sue the Government. . . . " 16 F.3d at 1212. The Federal Circuit's treatment of *Bowen* creates a conflict between the circuits.

3. The United States contends that the legislative history of the 1976 amendments of the APA support the

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[4] In *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d at 1532, the court concluded that the plaintiff's contract with a third party constituted a contract with the United States.

decision of the Ninth Circuit in this case. (Brief in opposition at 9, n. 5.) That isolated portion of the legislative history is inconclusive. Indeed, nothing in the Tucker Act or its legislative history demonstrates Congressional intent to foreclose equitable remedies.

In determining whether a statute precludes a court from reviewing agency action under the APA, a party must demonstrate by "clear and convincing evidence" that the legislature intended to restrict access to judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). The 1976 amendment to section 702 of the APA was unquestionably intended to provide aggrieved persons a ready means for bringing lawsuits for specific equitable relief against the government. Before those amendments, the system was clearly unfair. As observed by Senator Kennedy at the Senate Hearings:

> "A review of the cases – as confused as they are – reveals one certain conclusion: where sovereign immunity has been held to be a bar to suit, and where no other defenses . . . would have been applicable, unjust or irrational decisions have resulted."

House Rep. No. 94-1656, reprinted in 1976 United States Congressional Code and Administrative News ("U.S.C.C.A.N.") at 6129.

It is necessary to look to the language, history and case law of the Tucker Act to determine if Congress intended it to be the exclusive remedy. No such Congressional intent exists. Provisions of the House Report ignored by the United States establish that section 702 of the APA was not intended to affect the extent or limits of the government's monetary accountability under the

Tucker Act, but was intended to *also* make the government accountable for equitable relief:

> "[The amendment] would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus. Since [the amendment] would be limited only to actions of this type for specific relief, the recovery of money damages contained in . . . the Tucker Act governing contract actions would be unaffected."
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> . . . .
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> "[C]laims challenging official action or no action, and seeking relief other than money damages, should not be barred by sovereign immunity. The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory relief, mandatory relief, etc.). Thus, limitations on the recovery of money damages contained in . . . the Tucker Act or similar statutes are unaffected."

H.R. Rep. 94-1656, reprinted in 1976 U.S.C.C.A.N. 6121, 6124-25, 6131.

As such, Congress expanded sovereign immunity when it amended section 702. The "amendment to Section 702 was intended to broaden the avenues for judicial review. . . . " *Bowen*, 487 U.S. at 891. Congress intended to make the United States accountable for unlawful agency action in situations where plaintiffs seek equitable relief.

The provision of the section 702 legislative history relied upon by the United States, which states that an

existing statute precludes the waiver of immunity only "when Congress has *dealt in particularity* with a claim and intended a specified remedy" to be exclusive, supports the view that the Tucker Act does not provide exclusive remedies when read in its proper context. H.R. Rep. 94-1656, reprinted in 1976 U.S.C.C.A.N. at 6133 (emphasis added). It also refutes the view that Congress intended the Tucker Act to be an implied preclusion barrier *regardless* of the lack of preclusive intent expressed in the Tucker Act:

> "It makes little sense to treat previous Congress' silence on non-damage issues as an absolute bar given Congress' new welcoming attitude towards alternative relief. Only if previous statutes permitting damages have tackled the issue of non-damage remedies discriminatingly, signaling their rejection of all, or approving some and omitting others, would it make sense to preclude those not authorized."

Webster, Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief, 49 Ohio St. L.J. 725, 734 (1988). Because Congress never made a discriminating choice among remedies when enacting or amending the Tucker Act, The existence of the Tucker Act remedial scheme should not be construed as an implied limitation on non-monetary relief. *Id.* at 734-35.

Because the Tucker Act neither expressly nor impliedly states that it was intended by Congress to constitute an exclusive remedy in contract disputes involving the government, the lower courts erred in ruling that the district court lacked jurisdiction over petitioner's claim.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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